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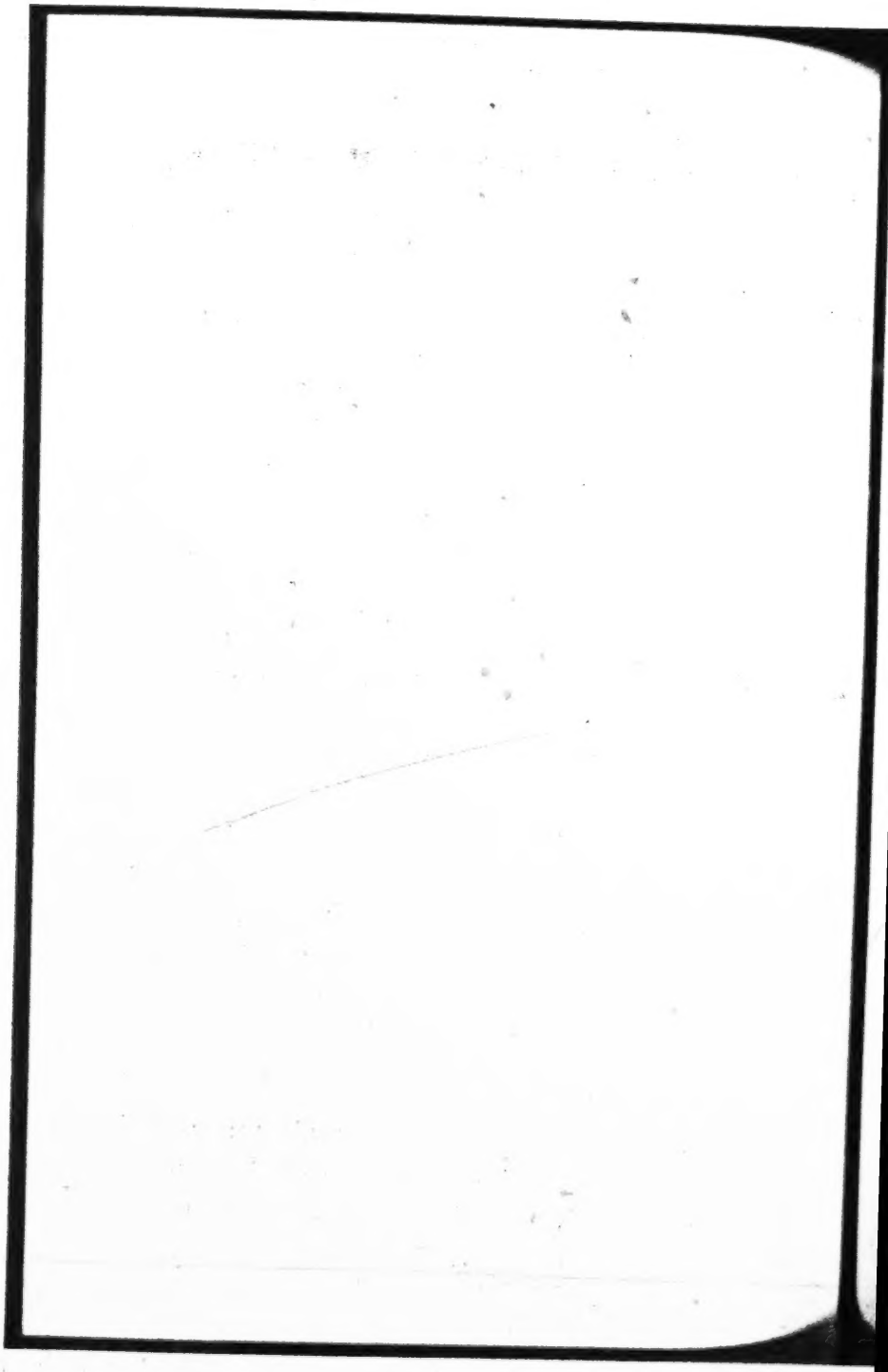

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI, PETITIONER

v.

CHICAGO MERCANTILE EXCHANGE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

OPINIONS BELOW

The opinion of the court of appeals (App. 32-45) is reported at 447 F.2d 713. The district court rendered no opinion in dismissing the complaint (App. 22).

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1971, and a timely petition for rehearing was denied on October 5, 1971 (App. 53). The

petition for a writ of certiorari was filed on January 3, 1972, and was granted on February 28, 1972 (405 U.S. 953). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a private treble-damage antitrust action alleging that a commodity exchange and others violated Section 1 of the Sherman Act, 15 U.S.C. 1, the doctrine of primary jurisdiction must be applied to permit the Secretary of Agriculture or the Commodity Exchange Commission to consider whether the defendants violated the Commodity Exchange Act or the rules of the defendant commodity exchange.

STATUTE INVOLVED

The pertinent provisions of the Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, are set forth in the addendum to petitioner's brief on the merits.

INTEREST OF THE UNITED STATES

This case raises an important question concerning the proper scope of the doctrine of primary jurisdiction in antitrust cases. The United States is interested in maintaining the proper division of responsibility between regulatory agencies and the federal courts in the antitrust area, since an improper application of the primary jurisdiction doctrine could seriously impede the enforcement of the fundamental national economic policy which is expressed in federal

antitrust laws. In addition, a number of cases are pending in the lower federal courts, including one filed by the United States,[1] which involve antitrust claims concerning practices in the commodities trading business and which are likely to be affected by the decision in this case.

STATEMENT

This private treble-damage antitrust suit was brought by petitioner against respondents—the Chicago Mercantile Exchange (a commodity exchange under the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*), three of its officers, Siegel Trading Co., a member firm of the Exchange, and the president of Siegel Trading—to recover damages allegedly suffered by petitioner from cancellation of his membership and trading privileges in the Exchange. The complaint alleged that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to prevent petitioner from maintaining his membership in the Exchange, and had transferred his membership in violation of the rules of the Exchange (App. 6-20).[2]

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[1] *United States* v. *Board of Trade of City of Chicago* (N.D. Ill., No. 71 C 2875).

[2] Exchange Rule 307 states that a membership can be transferred or sold only when the member signs an authorization to transfer. If the transfer of petitioner's membership was invalid, it would appear he was also improperly denied trading privileges on the Exchange in violation of Rule 322. Paragraph 10 of the complaint sets forth the rules involved here (App. 8-10).

Specifically, the complaint alleged that Siegel induced the Exchange to transfer petitioner's membership to a third party by use of a blank authorization to transfer membership that petitioner had executed in October 1967, but subsequently had revoked (App. 13). The transfer allegedly took place without notice and hearing, and without consideration of petitioner's claim, known to the Exchange, that a debt he owed to Siegel was more than offset by a debt owed by Siegel to petitioner. As a result, petitioner alleged, he was unable to conduct his business until he purchased a new membership in the Exchange (App. 11-13).[3]

The district court dismissed the complaint without stating any reasons (App. 22). The court of appeals treated the dismissal as based on failure to state a cause of action under Section 1 of the Sherman Act and reversed.[4] The court first held that "absent any justification from the Exchange's status as a board of trade and a designated 'contract market,' the complaint is sufficient to allege a group boycott, a *per se*

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[3] The complaint also alleged tortious interference with advantageous commercial relationships, in violation of Illinois law (App. 16-20).

[4] Although the district court had ordered certain depositions taken prior to ruling on respondents' motion to dismiss, the court of appeals found that the district court had not considered the deposition testimony (reproduced in part at App. 23-31) in dismissing the complaint (App. 34-35). Accordingly, for the purposes of reviewing the dismissal, the court of appeals also disregarded the testimony and took the factual allegations in the complaint as true (App. 35).

violation of section 1 of the Sherman Act" (Pet. App. 10a).

The court held, however, with one dissent, that under the doctrine of primary jurisdiction the antitrust proceedings should be stayed until the Commodity Exchange Commission or the Secretary of Agriculture passed on the validity of the defendants' conduct under the rules of the Exchange and the Commodity Exchange Act, 7 U.S.C. 1, *et seq.* (App. 37-45). The court ruled that the facts alleged in the complaint in support of the antitrust charge also constituted violations of Exchange rules which the Commission or the Secretary could investigate (App. 41).

The dissent noted that although the Commission and the Secretary might be able to determine whether there had been violations of Exchange rules, they had no jurisdiction to decide antitrust issues. The dissent also stated that the district court was just as competent as either the Commission or the Secretary to resolve the factual questions involved in the antitrust complaint (App. 45-52).

ARGUMENT

Introduction and Summary

In ordering the district court to stay its consideration of petitioner's antitrust suit until the Secretary of Agriculture or the Commodity Exchange Commission considers the challenged conduct underlying the suit, the court of appeals concluded that at least some of the issues raised were within the primary juris-

diction of the Secretary or the Commission. In our view, this conclusion is unwarranted and is based on a faulty and incomplete analysis of the factors which must be considered in determining whether the primary jurisdiction of an agency should be invoked.

We begin in Part I with a general discussion of the doctrine of primary jurisdiction—its effect when invoked, its development over the years and its specific application in antitrust cases. The fundamental purpose of the doctrine is to allocate between courts and agencies the authority to determine various factual and legal issues. For the most part, the doctrine does not merely determine which forum should consider a given issue in the first instance, but actually allocates the decisional authority with respect to that issue.

The doctrine of primary jurisdiction has its roots in railroad rate cases in which this Court ruled that the Interstate Commerce Commission alone was competent to pass on the reasonableness of rates. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. The early cases cited the need for uniformity as the basis for the doctrine, but later cases stressed the need for agency expertise in the resolution of certain issues. Further refinement revealed that expertise, while an important factor, was insufficient standing alone to warrant invocation of the doctrine. With respect to many issues within an agency's jurisdiction, for example, the courts might be equally competent and specifically authorized to act. And while an agency may possess relevant ex-

pertise, the absence of an agency procedure to consider a controversy would be determinative. Thus, application of the doctrine of primary jurisdiction requires an examination of the particular regulatory scheme involved and a determination whether the exercise of normal judicial jurisdiction would interfere substantially with the administration of the scheme.

In antitrust cases involving the conflicting jurisdictional claims of courts and regulatory agencies, this Court has focused sharply on the character of the regulatory scheme. From a series of cases, the test has emerged that only where a regulatory scheme is "pervasive" and empowers an agency either to grant effective relief against antitrust violations or to immunize such conduct from the operation of the antitrust laws, should the court in which the suit was instituted defer to the jurisdiction of the agency.

In Part II of our argument, we apply the general principles developed in Part I to this case. First, the Commodity Exchange Act does not embody a pervasive regulatory scheme, but is concerned solely with the prevention of manipulation and unsound practices in commodities trading. The limited nature of the regulation is particularly apparent when the Act is compared with other regulatory statutes where primary jurisdiction has been applied in antitrust cases. Moreover, under the Act, neither the Secretary nor the Commission has broad or relevant powers to remedy antitrust violations or authority to immunize any practices from the operation of the antitrust laws.

In addition, other criteria for invoking the primary jurisdiction of an agency are not satisfied here. No need for agency expertise has been shown, since the issues raised concerning the validity of the transfer of petitioner's membership in the Chicago Mercantile Exchange are issues the district court is competent to consider. There has been no showing that judicial resolution of the issues will interfere with the administration of the Commodity Exchange Act. Finally it is doubtful whether a procedure exists under the Commodity Exchange Act whereby the Secretary of Agriculture or the Commodity Exchange Commission could consider any of the contentions raised by petitioner in his antitrust suit.

I. THE DOCTRINE OF PRIMARY JURISDICTION IS APPLIED IN AN ANTITRUST CASE INVOLVING A REGULATED INDUSTRY ONLY IF THE REGULATORY SCHEME IS PERVASIVE AND THE REGULATORY AGENCY HAS POWER TO GRANT EFFECTIVE RELIEF AGAINST THE ALLEGED ANTITRUST VIOLATION OR TO IMMUNIZE THE CONDUCT FROM THE OPERATION OF THE ANTITRUST LAWS

A. The Meaning and Application of the Doctrine

1. The doctrine of primary jurisdiction has been developed over the years in an attempt to allocate between courts and agencies, when their jurisdictions overlap, the authority to determine various factual and legal issues. While recognizing the legitimate role of the courts in resolving basic commercial disputes and in enforcing the antitrust laws, the doctrine also seeks to prevent unnecessary interference with the op-

eration of regulatory schemes enacted by Congress to be administered by regulatory agencies. Although sometimes described as merely requiring "preliminary resort" to an agency, *Far East Conference* v. *United States*, 342 U.S. 570, 574-575, the doctrine, when applied, more usually operates to give an agency the conclusive authority, subject only to normal judicial review, to determine at least some of the issues in a proceeding. As this Court has noted, application of the doctrine "does 'more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects' of commercial relations. 'It transfers from court to agency the power to determine' some of the incidents of such relations." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 65, quoting Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L. Rev. 577, 583-584 (1954).

Normally, when an agency's primary jurisdiction is properly invoked prior to an agency determination, the court in which the case was instituted should stay the proceeding until the agency has acted. See, *e.g.*, *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62.[5] When the agen-

[5] In certain circumstances, a court may be required to dismiss rather than to stay a proceeding even though the agency's determination may not dispose of all the issues in the lawsuit. In *Far East Conference* v. *United States*, 342 U.S. 570, a court was asked to enjoin activities which the Federal Maritime Commission might have power to immunize from the operation of the antitrust laws. Although the court could have granted the injunction if the Federal Maritime Commission

cy has power to determine all the issues in the proceeding, however, the court should dismiss the case since upon conclusion of the agency's determination, there would be nothing further for the court to decide. See, *e.g.*, *Pan American Airways, Inc.* v. *United States*, 371 U.S. 296. In such cases, the agency may be said to have exclusive rather than primary jurisdiction.

Although the typical primary jurisdiction case involves a deferral of judicial action for an agency determination, the primary jurisdiction doctrine may be invoked after, as well as before, the conclusion of an agency proceeding. In such cases, the party invoking the doctrine may contend that the prior agency decision has already determined some of the issues in the judicial proceeding and that the court is required to follow that determination. See, *e.g.*, *United States* v. *Radio Corporation of America*, 358 U.S. 334.

In short, the usual effect of deferring to an agency's primary jurisdiction is to deprive the court of authority to make a *de novo* determination of the issues referred and to channel judicial consideration of the issues to appellate review of the agency' decision—

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decided not to immunize the conduct, the court was required to dismiss the suit. A stay was deemed unnecessary in these circumstances because the injunction suit could easily be reinstituted if appropriate. 342 U.S. at 576-577. See also *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-223. This Court later concluded, in reviewing a subsequent Commission decision through normal channels of judicial review, that the Federal Maritime Commission did not have power to immunize the challenged activities. *Federal Maritime Board* v. *Isbrandsten Co.*, 356 U.S. 481.

generally by a different court. See *Port of Boston, supra; United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353-354. In part because of this significant effect on a court's power, the doctrine of primary jurisdiction—in contrast to the requirement that administrative remedies be exhausted before judicial relief can be sought—cannot be mechanically applied. Rather, a court must determine "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *United States* v. *Western Pacific R. Co., supra*, 352 U.S. at 64.

2. The doctrine of primary jurisdiction has its roots in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. In that case, a shipper had brought an action in a state court against a railroad contending that the rates charged by the railroad were unreasonable. This Court held that the action was barred since Congress had given the Interstate Commerce Commission the exclusive authority to determine the reasonableness of rates; judicial interference would destroy the uniformity in rates envisioned by Congress.

In subsequent cases, the Court has emphasized the need to obtain the expert knowledge of the agency in resolving "issues of fact not within the conventional experience of judges" rather than the need for uniformity as a reason for applying the doctrine. *Far East Conference* v. *United States*, 342 U.S. 570, 574; *United States* v. *Western Pacific R. Co., supra*, 352

U.S. at 64-65. In *Western Pacific*, for example, the Court held that where words in a tariff are used in a technical sense and their construction requires a weighing of conflicting evidence and a familiarity with transportation policies, it is for the Interstate Commerce Commission, rather than the courts, to construe the words. 352 U.S. at 65-66.

A determination that an agency has expertise with respect to a given issue, however, does not necessarily mean that the agency has primary jurisdiction over that issue. The courts may be equally competent to resolve it. See *e.g.*, *Local Union No. 189* v. *Jewel Tea Co.*, 381 U.S. 676, 684-687 (opinion of Mr. Justice White). In some cases, Congress may have created a statutory right of action under which the courts have authority to decide certain matters without prior resort to an agency, notwithstanding the fact that the agency may itself have parallel jurisdiction over and special expertise concerning the subject. Thus, the federal district courts have jurisdiction under Section 301 of the Labor-Management Relations Act over suits by and against labor organizations relating to conduct which also is subject to the jurisdiction of the National Labor Relations Board because it is an unfair labor practice. See, *e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 176-188; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261; *Smith* v. *Evening News Association*, 371 U.S. 195; cf. *J.I. Case Co.* v. *Borak*, 377 U.S. 426.

Application of the doctrine of primary jurisdiction is inappropriate, regardless of agency expertise, where

no agency procedure exists for resolving a given issue before a court. Thus, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, a case involving a challenge under the antitrust laws to an order of the New York Stock Exchange requiring certain member brokers to discontinue direct wire communications with the plaintiff, the Court noted that there was no question whether the plaintiff was required to resort to the Securities and Exchange Commission for relief before coming into court, since the Commission had no "jurisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 357-358. See also, *Local Union No. 189* v. *Jewel Tea Co.*, *supra*, 381 U.S. at 687-688 (opinion of Mr. Justice White).

The decision whether the doctrine of primary jurisdiction applies requires a careful analysis of the regulatory scheme administered by the agency and a determination whether resolution of a particular issue by the courts will unduly interfere with such administration. Thus, in *Western Pacific*, *supra*, a technical tariff construction issue was referred to the Interstate Commerce Commission not merely because the Commission has expertise in tariff construction matters, but also because the Court concluded that in enacting the Interstate Commerce Act, Congress intended the Commission to consider important issues of transportation policy in the first instance. 352 U.S. at 65. In the words of one commentator (Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037, 1040-1041 (1964): "It is not merely the presence of expertness, but the wide-reaching and systematic character

of agency regulation which tends to choke out the normal jurisdiction of the courts."

B. The Application of the Doctrine in Antitrust Cases

In antitrust cases involving conflicting jurisdictional claims between courts and regulatory agencies, this Court has held that, in view of the fundamental nature of the antitrust laws and the role of the courts in enforcing them, a court should defer to an agency only if the agency has "pervasive" regulatory authority over the industry involved, including the power either to grant effective relief against conduct which violates basic antitrust policies or to immunize such conduct from the operation of the antitrust laws. Where there is such "pervasive" regulatory authority, the Court has concluded that particular remedies of the antitrust laws have been superseded by the regulatory statute in question. See *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 485; *Pan American World Airways* v. *United States*, 371 U.S. 296, 304-305.

In three leading cases involving the broadcasting, natural gas and banking industries, however, regulatory agencies have been held not to have primary jurisdiction to determine antitrust issues because the respective industries were not subject to "pervasive" regulation. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 350; *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 352.

In *Radio Corporation of America*, the Court held that the prior approval by the Federal Communica-

tions Commission of the exchange of television licenses did not bar an antitrust action alleging that the licenses were exchanged in furtherance of a conspiracy to restrain trade. Finding that in enacting the Federal Communications Act, 47 U.S.C. 151 *et seq.*, Congress had not abandoned the principle of free competition in the broadcasting industry and that the scope of Commission approval of the exchange of licenses was limited to a determination whether the exchange furthered the "public interest, convenience, and necessity," the Court held that there was no pervasive regulatory scheme which justified invocation of the doctrine of primary jurisdiction. 358 U.S. at 346-352.

In *California* v. *Federal Power Commission*, this Court held that the Federal Power Commission should stay proceedings to approve a merger under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, until the district court determined the legality of the merger under Section 7 of the Clayton Act. The Court found that the Natural Gas Act did not empower the Commission to adjudicate antitrust issues and concluded that a Commission decision approving the merger while the antitrust suit was pending could have an unwarranted influence on the suit. 369 U.S. at 485-486, 489.

Finally, in *Philadelphia National Bank*, the Court rejected the contention that a judicial proceeding challenging a bank merger under Section 7 of the Clayton Act could not be maintained because the prior approval of the merger by the Controller of the Currency constituted an exercise of the Controller's primary jurisdiction to determine the antitrust aspects of the merger.

In contrast, the Court concluded in *Pan American World Airways* v. *United States*, *supra*, that the Civil Aeronautics Act (now the Federal Aviation Act, 49 U.S.C. 1301 *et seq.*) gave the Civil Aeronautics Board basic and comprehensive regulatory authority over the carriers' limitations of air routes and divisions of territories that were the basis of the antitrust suit, including the power to prohibit unfair methods of competition and to approve those very practices. Accordingly, the Board had primary jurisdiction to consider the challenged conduct and the civil suit was ordered dismissed. 371 U.S. at 313. The Court did not hold, however, that the antitrust laws were entirely displaced with respect to the airline industry: it stated that the enforcement of criminal antitrust laws remained unaffected by the Civil Aeronautics Act and that civil antitrust violations might arise outside the scope of the Act and the Board's primary jurisdiction. 371 U.S. at 305.

Since the scope of the Board's primary jurisdiction to consider anticompetitive conduct was limited in the *Pan American* decision to conduct the Board had power to remedy or to immunize, it follows that statutory authority to remedy or to immunize antitrust violations is an essential element of primary jurisdiction in the antitrust area. This Court so interpreted *Pan American* in its subsequent decision in *Philadelphia National Bank*, *supra*. In holding that the Bank Merger Act, unlike the Civil Aeronautics Act, does not confer primary jurisdiction upon the regulatory agency, the Court observed (374 U.S. at 351):

> * * * In *Pan American*, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers; in contrast, the banking agencies have authority neither to enforce the antitrust laws against mergers, * * * nor to grant immunity from those laws.[6]

The Court's reluctance to apply primary jurisdiction in antitrust cases unless clearly mandated by the regulatory statute involved reflects the fundamental nature of the antitrust laws. As noted in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218:

> We have long recognized that the antitrust laws represent a fundamental national economic pol-

[6] An exemption from the antitrust laws may be implied from a statutory scheme even though the agency involved has no jurisdiction to consider the challenged conduct. In such a case, of course, the exemption follows not because an agency has primary jurisdiction, but because Congress in enacting the statute intended to remove the challenged conduct from the operation of the antitrust laws. In *Silver* v. *New York Stock Exchange*, *supra*, for example, where it was acknowledged that the Securities and Exchange Commission had no authority to consider certain challenged conduct (see p. 13, *supra*), the Court held that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. The reconciliation of any conflict between a regulatory scheme and the antitrust laws is a judicial function.

> icy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. * * *

Although the existence of primary jurisdiction in a regulatory agency does not necessarily involve a repeal of substantive antitrust standards, it limits the judicial remedies which Congress provided to enforce that fundamental national economic policy. This Court avoided this dilemma in the *Philadelphia National Bank* case by holding that under the Clayton Act and the Bank Merger Act of 1960 the banking agencies under the latter and the district court under the former are required independently to consider the anticompetitive effects of the merger.[7] Similarly, in *Carnation*, the Court held that the existence under the Shipping Act of a reparations remedy for overcharges should not preclude the injured party from pursuing its treble damage remedy under the antitrust laws for the same overcharges. In ruling that alternate or even duplicate remedies existed for the same conduct, the Court was simply implementing the congressional purpose to further the fun-

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[7] Congress subsequently expressly incorporated such dual consideration of anticompetitive effects into the Bank Merger Act of 1966, 12 U.S.C. 1828, which requires the agency to determine anticompetitive effects of bank mergers and provides for a subsequent *de novo* judicial determination of such anticompetitive effects under the identical standard.

damental national economic policy of competition by maximizing its enforcement.[8]

Finally, the fact that a court should not defer to a regulatory agency in an antitrust case in the absence of a pervasive regulatory scheme and agency power to remedy or immunize the challenged conduct does not foreclose the court from obtaining the benefit of agency expertise. The court may request the agency to participate as *amicus curiae* or as a party. See *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (C.A. 7), certiorari denied, 401 U.S. 994. Agencies also frequently themselves take the initiative in so participating. A district court has also requested, upon a motion of the United States, a report from the Administrator of the Commodity Exchange Authority for use in a pending antitrust proceeding involving the legality of commission rate fixing by a commodity exchange. *United States* v. *Board of Trade of the City of Chicago* (N.D. Ill., No. 71 C 2875).

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[8] Court decisions requiring regulatory agencies to consider anticompetitive effects in administering statutes requiring regulatory approval of particular transactions under the "theory of complementary regulation" provide another example of maximizing enforcement through dual remedies. See *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F.2d 953 (C.A.D.C.), and cases cited therein. As the court of appeals noted in *Northern Natural Gas*, the existence of a duty to consider anticompetitive effects does not mean that "agencies have jurisdiction to determine violations of the antitrust laws." 399 F.2d at 960. Cf. *United States* v. *Radio Corporation of America*, *supra*, 358 U.S. at 351-352. The existence of a duty to consider anticompetitive effects under the theory of complementary regulation is not a broad power to remedy antitrust violations which would satisfy the requirements for the invocation of the primary jurisdiction doctrine in an antitrust case.

II. THE PRIMARY JURISDICTION DOCTRINE IS INAPPLICABLE IN THIS CASE

A. The Commodity Exchange Act Does Not Create a Pervasive Regulatory Scheme and Does Not Provide for Administrative Authority to Prohibit Conduct Which Violates Antitrust Policies or to Immunize Such Conduct from the Operation of the Antitrust Laws

The Commodity Exchange Act does not embody a "pervasive" regulatory scheme within the meaning of this Court's decisions.[9] The basic purposes of the Act are to protect commerce and the public from the adverse effects of sudden or unreasonable fluctuations in the price of commodities sold on boards of trade; to guarantee fair practices and honest dealings on such markets; and to promote the orderly conduct of future transactions on such markets.[10] The Con-

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[9] The court of appeals conceded that the overall regulatory scheme embodied in the Commodity Exchange Act was less pervasive than the scheme involved in the *Pan American* case (see p. 16, *supra*), but concluded that the specific allegations in petitioner's complaint related to powers of the Secretary and the Commission which are basic to the regulatory scheme (App. 43-44 n. 15). While we do not believe that this is so (see pp. 26-27 *infra*), the court in any event did not find that such powers include the power to remedy antitrust violations. It held only that the Secretary and the Commission could consider antitrust policies—but see p. 19 n. 8 *supra*—and expressly declined to determine whether any administrative authority existed to immunize conduct from the operation of the antitrust laws (App. 42, 45 n. 18).

[10] Section 3 of the Act, 7 U.S.C. 5, notes the large volume and economic importance of commodity transactions and sets forth the findings of Congress that "the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or un-

gress which enacted the Act, originally called the Grain Futures Act, was concerned with preventing manipulations of the prices and the "cornering" of the supply of agricultural commodities as had frequently occurred in the late nineteenth century. See *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1.

The major features of the Act reveal its limited scope and purpose to prevent manipulation and unsound practices in futures transactions. A board of trade must register with the Secretary of Agriculture as a "contract market" in order to conduct futures trading, must file required reports with the Secretary, and must provide rules "for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators" on the market. 7 U.S.C. 7. The Secretary has authority to disapprove a rule of a contract market relating to terms and conditions of contracts of sale or other trading requirements if the rule violates the Commodity Exchange Act or any rule, regulation or order promulgated thereunder. 7 U.S.C. 12a. The Act specifically prohibits certain types of trades which are considered adverse to the public interest. 7 U.S.C.

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reasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

6b, 6c. In addition, the Act requires futures commission merchants and floor brokers to register with the Secretary and to maintain minimum capital requirements and authorizes the Secretary to suspend or revoke the registration of a futures commission merchant or broker who violates the Act or any rules of the Secretary. 7 U.S.C. 6d, 6f, 6g.

The Act also creates the Commodity Exchange Commission, which consists of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General, or their representatives. 7 U.S.C. 2. The Commission is authorized to suspend the designation of a board of trade as a contract market for a period not exceeding six months for violations of the Act or the rules of the Secretary or failure to enforce "its rules of government made a condition of its designation," 7 U.S.C. 8, and to issue cease-and-desist orders to remedy such violations. 7 U.S.C. 13a.

The limited regulation of the commodities industry to prevent price manipulation and cornering and to assure financial responsibility of commission merchants and brokers is in marked contrast to the "pervasive character" of the economic regulation in industries in which the primary jurisdiction doctrine has been applied in antitrust cases. See *United States Navigation Co.* v. *Cunard Steamship Co.*, *supra*; *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156; *Pan American World Airways* v. *United States*, *supra*. The Shipping Act, the Interstate Commerce Act, and the Civil Aeronautics Act (which were in-

volved, respectively, in those cases) all evidence a congressional intent either to limit or restrict competition in particular circumstances under agency supervision or to place definite antitrust powers in the hands of the regulatory agency. Agency authority to restrict competition is expressly provided in the statutes and is not inferred from a general reference to the "purposes" of the statutes.

For example, the Interstate Commerce Act gives the Interstate Commerce Commission power to set "maximum and minimum" rates for interstate rail, water and motor vehicle transportation in conformity with detailed standards. 49 U.S.C. 13(4), 15(1), 15a, 316(c), 318. Rebates are expressly prohibited (49 U.S.C. 2). The Commission also controls entry into the industry and extensions and abandonments of service (49 U.S.C. 1(18), 306), and must approve mergers and consolidations of carriers (49 U.S.C. 5, 312(b)). Transactions approved or authorized by the Commission are expressly exempted from the antitrust laws (49 U.S.C. 5(11), 5b).[11]

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[11] For other examples of pervasive regulatory schemes in situations in which the courts have held primary jurisdiction applicable, see *United States Navigation Co.* v. *Cunard Steamship Co., supra,* 284 U.S. at 480-486 (Shipping Act); *Pan American, supra,* 371 U.S. at 300-304 (Civil Aeronautics Act); *Carter* v. *American Telephone & Telegraph Co.,* 365 F. 2d 486, 494-495 (C.A. 5) (Communications Act-common carriers). Of course, the existence of pervasive regulatory schemes for certain purposes in industries covered by such acts does not mean that primary jurisdiction should be invoked in all antitrust cases involving those industries.

The contrasting lack of pervasive regulation in the Commodity Exchange Act is apparent. Neither the Secretary of Agriculture nor the Commodity Exchange Commission can limit entry of commodity brokerage firms into the commodities trading business, or has authority over expansions, mergers or withdrawals of firms from the business. The provision of particular services cannot be compelled. Moreover, new commodity exchanges may be organized and may withdraw from the business without regard to the economic consequences of these actions. Commission rates on exchanges are not subject to administrative approval and have never been regulated. Finally, there is no statutory immunity from the antitrust laws for actions of an exchange or its members.

Moreover, neither the Secretary nor the Commission is authorized to grant effective relief against conduct which violates antitrust policies, except to the extent of their specific regulatory authority to prevent manipulations and cornerings in the commodities trading business which may also constitute unreasonable restraints of trade.[12] The boycott alleged

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[12] Congress substantially amended the Commodity Exchange Act in 1968. See P.L. 90-258, 82 Stat. 26 *et seq.* The original version of the bill the Secretary of Agriculture proposed would have given him authority to issue a complaint if any person "has taken any action with the intent or having the effect of restraining trade in connection with the sale of any commodity, for future delivery or in interstate commerce, under contracts made on or subject to the rules of any board of trade * *." H.R. 11788, 89th Cong., 1st Sess., Section 20(a). Representatives of the commodity exchanges opposed this provision in congressional hearings. See, *e.g.*, Hearings

it this suit, however, is not related to price manipulation or cornering restraints.

Finally, the Commodity Exchange Act does not contain any express provision immunizing any activity from the operation of the antitrust laws. Although the court of appeals declined to determine whether the Secretary or the Commission had any power to grant antitrust immunity (App. 42, 45 n. 18), it suggested that the power to immunize might be implied from 7 U.S.C. 13c(b). That Section, however, merely states that neither the Secretary nor the Commission is required to report "minor violations" of the Act for prosecution when it would not be in the public interest to take such action. The provision makes no reference to the antitrust laws and obviously was not intended and should not be construed to limit the application of those laws to the commodities trading industry.

Thus, the Commodity Exchange Act does not provide pervasive regulation, broad or relevant powers to remedy antitrust violations or any power to immunize antitrust violations. Since none of these essential elements are present, the court of appeals erred in invoking the primary jurisdiction doctrine in this antitrust case.

Before the Subcommittee on Domestic Marketing and Consumer Relations *To Amend the Commodity Exchange Act*, House Committee on Agriculture, 89th Cong., 2d Sess., p. 52. The proposed provision was not adopted.

B. No Need for Agency Expertise has been Shown Here and Resolution of the Issues In this Case by the District Court Will Not Interfere With the Regulatory Scheme

As we have noted, primary jurisdiction is generally applied in cases involving regulatory agencies only if there is a need for agency expertise in resolving an issue central to a dispute, resolution of the issue by the courts will interfere significantly with the administration of the regulatory scheme, and an agency procedure exists for resolving the issue. The first two of these criteria are missing here; the existence of the third is in doubt.

1. There has been no showing of any need for administrative expertise to resolve the issues surrounding the alleged wrongful membership transfer. Whether petitioner had revoked the blank authorization to transfer his membership in the Exchange and whether the transfer took place improperly without notice or hearing and without consideration of petitioner's claim against Siegel (see p. 4, *supra*) are issues well within the competence of the district court to determine.

2. There is no indication that resolution of the issues by the district court will interfere with the regulatory scheme embodied in the Commodity Exchange Act. There are no provisions in the Act which specifically govern membership transfers and neither the Secretary nor the Commission has adopted rules on the subject. Moreover, it appears that no formal proceedings have ever been conducted before the Secre-

tary or the Commission on membership transfers.[13] Thus, at most, the policing of exchange membership practices is peripheral to the administration of the Commodity Exchange Act.

3. It is doubtful whether there is an administrative procedure for the determination of any issue in the antitrust proceeding. Under the Commodity Exchange Act, each commodity exchange designated as a contract market by the Secretary of Agriculture (see 7 U.S.C. 7) is obligated to enforce its rules or regulations which relate to "trading requirements." 7 U.S.C. 7a(8). If an exchange fails to comply with this or any other provision of the Act, the Secretary or the Commodity Exchange Commission may institute enforcement proceedings.[14] 7 U.S.C. 8, 9, 13a. The rules of the Chicago Mercantile Exchange allegedly violated here, however, relate to the transfer of memberships and may not be rules relating to "trading requirements" within the meaning of 7

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[13] The formal proceedings through June 30, 1971, are summarized in a Department of Agriculture publication entitled *Summary of Administrative and Judicial Proceedings Under the Commodity Exchange Act June 15, 1936-June 30, 1971, and Under the Grain Futures Act September 21, 1922-June 14, 1936.* None of the proceedings summarized therein appears to involve a membership transfer.

[14] Under 17 C.F.R. 0.53, any interested person may request that appropriate enforcement proceedings be instituted to remedy violations of the Act. Such a person would have no legal status in any proceedings which might be instituted, unless permitted to intervene.

U.S.C. 7a(8).[15] In that event, neither the Secretary nor the Commission would have any authority over their enforcement.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it directs the district court "to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it" (App. 45).

Respectfully submitted.

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[15] 7 U.S.C. 7a(8) was added to the Act in 1968 together with a provision authorizing the Secretary to disapprove certain exchange rules (see 7 U.S.C. 12a(7)). In commenting on the additions, the Senate committee report states: "These provisions do not apply to bylaws, rules, regulations and resolutions, such as those covering the organization and government of the exchange, which are unrelated to contract terms and conditions, trading requirements and financial requirements." S. Rep. No. 947, 90th Cong., 2d Sess., p. 9.

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